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International Covenant on Civil and Political Rights

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Human Rights Committee

Communication No. 2114/2011

Views adopted by the Committee at its 112th session (7–31 October 2014)

Submitted by:	Leonid Sudalenko (not represented by counsel)
Alleged victim:	The author
State party:	Belarus
Date of communication:	17 September 2011 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 27 October 2011 (not issued in a document form)
Date of adoption of Views:	22 October 2014
Subject matter:	Right to freedom of expression
Procedural issues:	Exhaustion of domestic remedies
Substantive issues:	Right to freedom to seek, receive and impart information
Articles of the Covenant:	2 and 19
Articles of the Optional Protocol:	2; 5, para. 2 (b)

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Annex

Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political rights (112th session)

concerning

Communication No. 2114/2011*

Submitted by:	Leonid Sudalenko (not represented by counsel)
Alleged victim:	The author
State party:	Belarus
Date of communication:	17 September 2011 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 22 October 2014,

Having concluded its consideration of communication No. 2114/2011, submitted to the Human Rights Committee by Leonid Sudalenko, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Leonid Sudalenko, a Belarusian national, born in 1966. He claims to be a victim of violations by Belarus of his rights under article 2, paragraph 2, read in conjunction with article 19, paragraph 2, of the International Covenant on Civil and Political Rights. The Optional Protocol entered into force for Belarus on 30 December 1992. The author is unrepresented.

The facts as submitted by the author

2.1 The author submits that on 30 November 2010, while returning from Lithuania, he was subjected to a search by customs officers of the Oshmyansky customs station at the border checkpoint "Kamenny Log" in Belarus. He submits that, at the time, he was

* The following members of the Committee participated in the examination of the present communication: Yadh Ben Achour, Lazhari Bouzid, Christine Chanet, Ahmad Amin Fathalla, Cornelis Flinterman, Yuji Iwasawa, Walter Kälin, Zonke Zanele Majodina, Sir Nigel Rodley, Victor Manuel Rodriguez-Rescia, Fabián Omar Salvioli, Anja Seibert-Fohr, Yuval Shany, Konstantine Vardzelashvili, Margo Waterval and Andrei Paul Zlatescu.
Individual opinions by Committee members Gerald L. Neuman and Victor Manuel Rodriguez-Rescia (concurring) are appended to the present Views.

preparing to participate as an observer in the presidential elections in Belarus, to be held on 19 December 2010. During the search, the customs officers seized ten brochures entitled, "Instructions for short-term observers of the elections of the President of Belarus". The author submits that by doing so, the authorities wanted to prevent him and other observers from monitoring the situation during the elections.

2.2 The author submits that the seizure of the documents by the customs officers was based on article 14 of the Law on Fighting Extremism of 4 January 2007 (hereinafter, the Law). Based on the Law, the Government adopted the regulation, "Instructions on Cooperation of National Authorities in Fighting Extremism" (hereinafter, the Instructions) dated 28 July 2008. The author claims that, although the Law reportedly mandates a seizure of information materials containing incitement to extremism or its propaganda, in practice the Instructions allow for arbitrary seizure of any printed materials "for further examination".

2.3 On 1 December 2010, the author appealed against the seizure of the brochures to the Head of the State Customs Committee, requesting an immediate return of the documents, which were needed before and during the elections. He claims that, under article 49 of the Elections Law, he should have received a response within three days of filing of the complaint. Since he did not receive a response from the State Customs Committee, on 7 December 2010, he filed a complaint with the Oshmyansky District Court, claiming that on 30 November 2010, the customs officers violated his right to seek and impart information, as guaranteed by articles 23 and 34 of the Belarus Constitution.

2.4 The Oshmyansky District Court rejected his appeal on 5 January 2011, holding that the customs officers had followed all the applicable rules and regulations, and correctly "withheld" some printed materials. Those brochures were then sent for "expert analysis" to identify whether their content was "extremist". The Court stated that if the analysis did not find any extremist content, the brochures would be returned to the author.

2.5 The author appealed that decision on 14 January 2011 to the Grodno Regional Court, arguing that the seizure of the election brochures was arbitrary. The author submits that if customs officers have the right to seize any printed material, the regulation violates the provisions of article 19 of the International Covenant on Civil and Political Rights. In its rejection, dated 2 March 2011, the Grodno Regional Court agreed with the lower court, and noted that the customs authorities had returned the brochures after it had been ascertained that they did not contain any extremist content.

2.6 The author submits that the brochures in question were returned to him on 13 January 2011 only, i.e. after the presidential elections on 19 December 2010. He claims that at that time, he did not need them anymore, and the temporary seizure of the brochures was intended to obstruct his monitoring activities before and during the elections.

2.7 The author further submits that on 11 April and 23 May 2011, he filed two requests for supervisory review with the President of the Grodno Regional Court and the President of the Supreme Court of Belarus, but his complaints were rejected on 16 May and 27 June 2011, respectively. He contends that he has exhausted all available and effective domestic remedies and notes that any further appeal would have been ineffective, as evidenced also by the Committee's long-standing jurisprudence on requests for supervisory review to the Prosecutor General of Belarus.

The complaint

3.1 The author claims that the inconsistency between article 14 of the Law and article 2 of the Instruction resulted in arbitrary seizure of his election brochures, in violation of his right to freedom of expression, in particular the freedom to impart information in any form,

with regard to presidential elections, in accordance with article 19, paragraph 2, of the Covenant.

3.2 Beyond the violation of articles 34 and 23 of the Constitution, the author alleges that the seizure of the documents in application of article 2 of the Instructions presented a restriction to his right to freedom of expression without meeting the criteria of necessity, as stipulated in article 19, paragraph 3, of the Covenant. In his view, the application of the national legislation without regard to the obligations under the Covenant has also resulted in the violation of articles 26 and 27 of the Vienna Convention on the Law of Treaties (1969).[1] Further, the author contends that non-compliance of the Instruction with the Law resulted in a violation of article 2, paragraph 2, read in conjunction with article 19, paragraph 2, of the Covenant.

State party's observations on admissibility

4.1 On 23 December 2011, the State party challenged the admissibility of the communication, arguing that the author had failed to exhaust all available domestic remedies, as he had failed to request the Prosecutor General to initiate supervisory review proceedings of his case.

4.2 In a note verbale dated 25 January 2012, the State party submitted that upon becoming a party to the Optional Protocol, it had recognized the Committee's competence, under article 1 thereof, to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by the State party of any rights set forth in the Covenant. That recognition of competence was undertaken in conjunction with other provisions of the Optional Protocol, including those establishing criteria regarding the petitioners and the admissibility of their communications, in particular articles 2 and 5 of the Optional Protocol. The State party maintains that States parties have no obligation, under the Optional Protocol, to recognize the Committee's rules of procedure nor its interpretation of the provisions of the Optional Protocol. The State party submits that, in the context of the complaint procedure, States parties should be guided first and foremost by the provisions of the Optional Protocol and that reference to the Committee's long-standing practice, methods of work and case law are not subjects of the Optional Protocol. It also submits that any communication registered in violation of the provisions of the Optional Protocol to the Covenant will be viewed by the State party as incompatible with the Optional Protocol and will be rejected without comments on the admissibility or merits, and any decisions taken by the Committee on such rejected communications will be considered by its authorities as "invalid".

Author's comments on admissibility

5.1 On 25 January 2012, the author, commenting on the State party's challenge of the admissibility of his complaint, submits that he did not request the Prosecutor General to initiate a supervisory review of the lower court's decision, as said review by the Prosecutor General is a purely discretionary procedure and cannot be deemed effective, as confirmed by the Committee in its jurisprudence.

5.2 On 21 March 2012, he reiterates that he has exhausted all available and effective domestic remedies. He submits that the Committee has already looked into the issue of supervisory review and decided that a remedy must be effective to be considered for

[1] The author referred to Communication No. 628/1995, *Park* v. *Republic of South Korea*, Views adopted on 20 October 1998, in which the Committee found it incompatible with the Covenant that the State party had given priority to the application of its national law over its obligations under the Covenant.

purposes of exhaustion. Regarding the State party's challenge of the Committee's competence to develop its own rules of procedure, the author argues that by becoming a party to the Covenant and its Optional Protocol, the State party has undertaken obligations to respect the Committee's competency to issue Views, as well as develop its rules of procedure and general comments.

5.3 On 14 September 2012, the author submits that, in order to show the ineffectiveness of the supervisory review by the Prosecutor General, he did submit a complaint to the office on 24 May 2012. In a letter dated 6 September 2012, the Prosecutor General rejected the author's complaint and stated that the customs officers had acted in full compliance with the relevant law and regulations.

State party's further comments on admissibility

6. On 4 January 2013, the State party submits that the author "launched further appeals required by the supervisory review proceedings" only after his complaint had been registered with the Committee. The State party further claims that that constitutes a violation of article 2 of the Optional Protocol, since the author should first exhaust all domestic remedies, then submit a complaint to the Committee.

Issues and proceedings before the Committee

State party's lack of cooperation

7.1 The Committee notes the State party's assertion that there are no legal grounds for consideration of the author's communication, insofar as it was registered in violation of the provisions of the Optional Protocol; that it has no obligation to recognize the Committee's rules of procedure nor the Committee's interpretation of the provisions of the Optional Protocol; and that any decision taken by the Committee on the present communication will be considered "invalid" by its authorities.

7.2 The Committee recalls that under article 39, paragraph 2, of the Covenant, it is empowered to establish its own rules of procedure, which States parties have agreed to recognize. It further observes that, by adhering to the Optional Protocol, a State party to the Covenant recognizes the competence of the Committee to receive and consider communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant (preamble and art. 1 of the Optional Protocol). Implicit in a State's adherence to the Protocol is the undertaking to cooperate with the Committee in good faith so as to permit and enable it to consider such communications, and after examination thereof, to forward its Views to the State party and to the individual (art. 5, paras. 1 and 4). It is incompatible with those obligations for a State party to take any action that would prevent or frustrate the Committee in its consideration and examination of the communication, and in the expression of its Views.[2] It is up to the Committee to determine whether a communication should be registered. The Committee observes that, by failing to accept the competence of the Committee to determine whether a communication should be registered and by declaring beforehand that it will not accept the determination of the Committee on the admissibility or on the merits of such communication, the State party is violating its obligations under article 1 of the Optional Protocol to the Covenant.[3]

[2] See, inter alia, communication No. 869/1999, *Piandiong et al.* v. *the Philippines*, Views adopted on 19 October 2000, para. 5.1.

[3] See, inter alia, communication No. 1226/2003, *Korneenko* v. *Belarus*, Views adopted on 20 July 2012, paras. 8.1 and 8.2; and communication No. 1948/2010, *Turchenyak et al* v. *Belarus*, Views adopted on 24 July 2013, paras. 5.1 and 5.2.

Consideration of admissibility

8.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the case is admissible under the Optional Protocol to the Covenant.

8.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

8.3 The Committee notes that the State party has challenged the admissibility of the communication on the grounds of non-exhaustion of domestic remedies under article 5, paragraph 2 (b), of the Optional Protocol, stating that the author did not request the Prosecutor's Office to consider his case under supervisory review proceedings. The Committee also notes that the State party has challenged the registration of the communication, stating that it was registered prior to exhaustion of "all available domestic remedies". The Committee recalls its jurisprudence, according to which a petition to a Prosecutor's Office for supervisory review of court decisions that have taken effect does not constitute a remedy which has to be exhausted for the purposes of article 5, paragraph 2 (b), of the Optional Protocol.[4] Therefore, the author's request to the Prosecutor's Office to initiate a supervisory review after his submission of the communication does not change the Committee's assessment that a supervisory review cannot be considered an effective domestic remedy. Accordingly, the Committee considers that it is not precluded by the requirements of article 5, paragraph 2 (b), of the Optional Protocol from examining the present communication.

8.4 The Committee takes note of the author's submission that the State party violated its obligations under article 2, paragraph 2, of the Covenant, read in conjunction with article 19, since it failed to adopt such laws or other measures as may be necessary to give effect to the rights recognized in article 19 of the Covenant. The Committee also considers that the provisions of article 2 cannot be invoked in a claim in a communication under the Optional Protocol in conjunction with other provisions of the Covenant, except when the failure by the State party to observe its obligations under article 2 is the proximate cause of a distinct violation of the Covenant directly affecting the individual claiming to be a victim.[5] The Committee notes, however, that the author has already alleged a violation of his rights under article 19, resulting from the interpretation and application of the existing laws of the State party, and the Committee does not consider that examination of whether the State party has also violated its general obligations under article 2, paragraph 2, of the Covenant, read in conjunction with article 19, to be distinct from examination of the violation of the author's rights under article 19 of the Covenant. The Committee therefore considers that the author's claims in that regard are incompatible with article 2 of the Covenant and inadmissible under article 3 of the Optional Protocol.

8.5 In the light of the information before it, the Committee considers that the author has sufficiently substantiated his remaining claims, which raise issues under article 19 of the Covenant, for the purposes of admissibility. Accordingly, it declares them admissible and proceeds to its examination on the merits.

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[4] Communication No. 1873/2009, *Alekseev* v. *the Russian Federation*, Views adopted on 25 October 2013, para. 8.4.

[5] See communications No. 2202/2012, *Castañeda* v. *Mexico*, decision adopted on 29 August 2013, para. 6.8; No. 1834/2008, *A.P.* v. *Ukraine*, decision adopted on 23 July 2012, para. 8.5; No. 1887/2009, *Juan Peirano Basso* v. *Uruguay*, Views adopted on 19 October 2010, para. 9.4; also No. 2030/2011, *Poliakov* v. *Belarus*, Views adopted on 17 July 2014, para. 7.4.

Consideration of merits

9.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as required under article 5, paragraph 1, of the Optional Protocol.

9.2 The first issue before the Committee is whether the seizure of the election-related brochures that were in the author's possession constitutes a violation of the author's rights under article 19 of the Covenant.

9.3 The Committee recalls that article 19, paragraph 2, of the Covenant requires States parties to guarantee the right to freedom of expression, including the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print. The Committee refers to its general comment No. 34 (2011) on freedoms of opinion and expression, which states that freedom of opinion and freedom of expression are indispensable conditions for the full development of the person. They are essential for any society and constitute the foundation stone for every free and democratic society (para. 2). Any restriction on the exercise of those freedoms must conform to the strict tests of necessity and proportionality and restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated (para. 22).[6]

9.4 The Committee recalls that article 19, paragraph 3, of the Covenant allows certain restrictions, but only as provided by law and necessary: (a) for respect of the rights or reputation of others; or (b) for the protection of national security or of public order (ordre public), or of public health or morals. The Committee notes that if a State party imposes a restriction, it is for the State party to demonstrate that the restriction on the rights under article 19, paragraph 2, of the Covenant was necessary in the case in question, and that even if, in principle, States parties may introduce a system aimed at reconciling an individual's freedom to impart information and the general interest of maintaining public order in a certain area, the system must not operate in a way that is incompatible with the object and purpose of article 19 of the Covenant.[7]

9.5 The Committee notes that the State party has not submitted any observations on the merits of the present communication, nor any justification or reasons as to how, in practice, the seizure of the elections-related brochures in question, would fall under one of the legitimate restrictions set out in article 19, paragraph 3, of the Covenant, even if the seizure was permissible by law. The Committee also notes that the authorities have failed to explain why it was necessary to restrict the author's right to freedom to seek, receive and impart information for respect of the rights or reputations of others, for the protection of national security or of public order (ordre public), or of public health or morals.

9.6 In the circumstances described above and in the absence of any information from the State party to justify the restriction to the author's right for purposes of article 19, paragraph 3, the Committee concludes that the author's rights under article 19, paragraph 2, of the Covenant were violated.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the information before it discloses a violation by the State party of the author's rights under article 19, paragraph 2, of the International Covenant on Civil and Political Rights.

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[6] See, for example, communication No. 1948/2010, *Turchenyak et al.* v. *Belarus*, Views adopted on 24 July 2013, para. 7.7.

[7] Ibid., para. 7.8.

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including compensation. The State party is also under the obligation to take steps to prevent similar violations in the future.

12. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views, and to have them widely disseminated in Belarusian and Russian in the State party.

Appendices

Appendix I

[Original: English]

Individual opinion of Committee member Gerald L. Neuman (concurring)

I fully concur with the conclusions of the Committee on admissibility and merits, but I write separately to express concern about the Committee's reasoning in paragraph 8.4 of its Views. There the majority repeats the so-called "Poliakov formula,"[a] which rejects the admissibility of the author's claim under article 2, paragraph 2, read in conjunction with his substantive right, but which allows for the possibility that there might exist some other situation in which a claim under article 2, paragraph 2, read in conjunction with a substantive right could be admissible. For reasons explained in previous individual opinions,[b] I believe that the Committee should maintain its traditional interpretation of article 2, paragraph 2, and should state unequivocally that such claims do not exist and are always inadmissible. The experience of the Committee since July 2014 has confirmed that leaving open this possibility leads the Committee to unproductive discussions and makes no practical contribution to the protection of human rights. I look forward to the day when the Committee abandons this new formulation.

[a] See communication No. 2030/2011, *Poliakov* v. *Belarus*, Views adopted on 17 July 2014, para. 7.4. This formulation may also be referred to as "Poliakov 2030," to distinguish it from the reasoning on admissibility in another case involving the same author, communication No. 2103/2011, *Poliakov* v. *Belarus*, Views adopted on 17 July 2014, para. 9.5.

[b] See communications No. 1976/2010, *Kuznetsov et al.* v. *Belarus*, Views adopted on 24 July 2014, appendix I, joint opinion concurring with the Committee's Views, but criticizing the Poliakov formula; and No. 1874/2009, *Mihoubi* v. *Algeria*, Views adopted on 18 October 2013, individual opinion of Gerald L. Neuman, concurring with the Committee's Views and supporting the Committee's traditional approach.

Appendix II

[Original: Spanish]

Individual opinion of Committee member Victor Manuel Rodríguez-Rescia (concurring)

1. While I fully agree with the Committee's findings regarding the admissibility and the merits of the communication in relation to a violation of article 19, paragraph 2, of the Covenant, I must express my disagreement with the Committee's interpretation of article 2, paragraph 2, of the Covenant, as set out in paragraph 8.4 in this communication and in other cases that reproduce the formulation that appears in the Committee's Views, communication No. 2030/2011, *Poliakov* v. *Belarus*. My understanding of the application of article 2, paragraph 2, is that, when a national law runs counter to a substantive right enshrined in the Covenant, as is the case in this instance with regard to article 19, paragraph 2, then that law should be amended in such a way that it ceases to be an obstacle to the enjoyment of the right to receive and impart information. In the case at hand, article 14 of the Belarusian Anti-Extremism Act of 4 January 2007 and its implementing regulations of 28 July 2008 provide for the seizure of informational materials that may incite or promote extremism. This broad, indefinite term lends itself to its use in Belarus to arbitrarily restrict access to information, the dissemination of ideas and freedom of expression. This is accomplished by means of the widespread practice of confiscating information of any type with the excuse of "examining it more closely". This was what was done in the present case to restrict the author's enjoyment of the right set forth in article 19, paragraph 2, of the Covenant. Because we are dealing with a specific case in which that law was applied, rather than engaging in a general discussion concerning its existence and enforcement in the abstract, the Committee should have found a violation of article 2, paragraph 2, read in conjunction with article 19, paragraph 2.[a]

2. In the present case, both the existence and the direct application of that national law in a specific instance are sufficient reason for the Committee to have modified its restrictive practice of refraining from finding a violation of article 2, paragraph 2, read in conjunction with another substantive article. In the present case, the author invoked this violation and demonstrated that the application of the law had violated his rights under article 19, paragraph 2.

[a] See communication No. 2030/2011, *Poliakov v. Belarus*, Views adopted on 17 July 2014, para. 7.4.